Kemayan Construction Sdn Bhd v Prestara Sdn Bhd

HIGH COURT (KUALA LUMPUR) — COMPANIES WINDING-UP NO D5–28–310 OF 1996
KAMALANATHAN RATNAM JC
13 JUNE 1997

Contract *— Building contract — Claim for work done — Failure of contractor to rectify defects — Whether such failure would justify refusal to make payment for work done*

Companies and Corporations *— Winding up — Inability to pay debt — Bona fide dispute as to whether debt owing to petitioner — Filing of petition to wind up company even though petitioner's breach under the contract had yet to be remedied — Whether filing of petition was premature — Whether demand of the petitioner was excessive*

The respondent had signed a building contract ('the contract') with a contractor ('the original contractor'). Subsequently, the respondent, the petitioner and the original contractor entered into a deed of novation whereby, inter alia, the original contractor was released from the performance of the contract and the petitioner was substituted in its place accordingly. On 6 October 1995, the architect to the project ('the architect') certified Interim Certificate No 15 for a sum of RM1,106,099.57. On 9 October 1995, the architect issued a certificate of practical completion with a list of defects to be rectified by the petitioner within the 12-month defects liability period. On 16 November 1995, the architect issued Interim Certificate No 16 for a sum of RM1,646,782.94.

The petitioner failed to remedy the defects and complete the works. The respondent therefore refused to pay the petitioner. On 19 August 1996, the petitioner filed a petition as well as the statutory notice of demand pursuant to s 218 of the Companies Act 1965 demanding the total sum of RM2,752,882.51 based on Interim Certificate Nos 15 and 16. The respondent disputed the debt on the basis that the building constructed had been found to have various defects. In its submission, the petitioner contended that the balance one moiety of the retention sum was sufficient to cover all the rectification costs and that therefore the respondent ought to honour the two interim certificates. The architect's letter dated 11 April 1996 ('the architect's letter') that the costs of rectification would be deducted from the retention sum was produced.

Held, dismissing the petition:

(1) Under the contract, the petitioner had an obligation to comply with the architect's instructions and to rectify the defects at its own cost pursuant to the architect's instructions. It was not open to the petitioner to argue that since it had not been paid it was entitled to disregard the architect's instructions and refuse to rectify the defects. Therefore, it was the petitioner's breach in

the first instance that prompted the respondent to exercise its rights under the contract to withhold payment.

Thus, for the purposes of a right to wind up, the failure of the petitioner to comply with the architect's directive with regard to the defects clearly and without a doubt gave the respondent a right to dispute the interim certificate and it followed therefore that the debt was in dispute. The respondent was thus justified in refusing to pay the petitioner.

Further, the filing of the petition was premature as the contract required the petitioner to rectify the defects within the 12-month defects liability period. As a result of the breach on the part of the petitioner, the respondent was entitled under the contract to deduct from the interim certificates for the rectification works. On this issue too, there was a bona fide dispute on the demand by the petitioner (see pp 614E–G and 615C–D).

(2) It was uncertain from the available evidence and submission whether the retention sum was sufficient to cover all the rectification works, as the major rectification works had yet to be carried out. In any event, the architect's letter by itself served to override the release of one moiety of the retention sum under Interim Certificate No 16. If indeed the architect was of the opinion that the balance one moiety was sufficient to cover the defective works, he would have written '... deducted from the balance one moiety of the retention sum'. In the circumstances, the demand of the petitioner which included one half of the retention sum was excessive, thus rendering the s 218 notice invalid (see pp 615F and 616E–G).

[Bahasa Malaysia summary

Penentang telah menandatangani suatu kontrak pembangunan ('kontrak tersebut') dengan seorang kontraktor ('kontraktor asal'). Berikutnya, penentang, pempetisyen dan kontraktor asal telah mengikat suratikatan novasi di mana, antara lain, kontraktor asal dilepaskan daripada pelaksanaan kontrak tersebut dan pempetisyen mengganti tempatnya. Pada 6 Oktober 1995, arkitek projek ('arkitek') mengesahkan Sijil Interim No 15 untuk jumlah sebanyak RM1,106,099.57. Pada 9 Oktober 1995, arkitek mengeluarkan sijil penyempurnaan praktikal dengan senarai kecacatan untuk dibaiki oleh pempetisyen dalam tempoh liabiliti kecacatan 12 bulan. Pada 16 November 1995, arkitek mengeluarkan Sijil Interim No 16 untuk jumlah sebanyak RM1,646,782.94.

Pempetisyen telah gagal membaiki kecacatan dan menyelesaikan kerja-kerja. Dengan itu penentang enggan membayar pempetisyen. Pada 19 Ogos 1996, pempetisyen memfailkan satu petisyen serta notis tuntutan statutori menurut s 218 Akta Syarikat 1965 menuntut jumlah keseluruhan RM2,752,882.51 berdasarkan Sijil Interim No 15 dan 16. Penentang mempertikaikan hutang atas dasar bahawa

bangunan yang didirikan telah didapati mempunyai pelbagai kecacatan. Dalam hujah, pempetisyen menghujahkan bahawa baki sebahagian jumlah yang ditahan mencukupi bagi meliputi semua kos pembetulan dan maka dengan itu penentang sepatutnya menghormati kedua-dua sijil interim itu. Surat arkitek bertarikh 11 April 1996 ('surat arkitek tersebut') bahawa kos pembetulan akan ditolak daripada jumlah yang ditahan telah dikemukakan.

Diputuskan, menolak petisyen:

(1) Di bawah kontrak tersebut, pempetisyen berkewajipan mematuhi arahan arkitek dan untuk membaiki kecacatan atas kos sendiri menurut arahan arkitek. Ianya tidak terbuka kepada pempetisyen untuk menghujahkan bahawa oleh kerana ia tidak dibayar ia adalah berhak mengabaikan arahan arkitek dan enggan membaiki kecacatan. Oleh itu, ia merupakan kemungkiran pempetisyen pertamanya yang menyebabkan penentang melaksanakan haknya di bawah kontrak tersebut untuk menahan bayaran.

Justeru itu, bagi tujuan hak menggulung, kegagalan pempetisyen untuk mematuhi arahan arkitek berkenaan dengan kecacatan dengan jelas dan tanpa keraguan memberikan penentang hak untuk mempertikaikan sijil interim dan ini bermakna bahawa hutang itu dipertikaikan. Penentang dengan itu berjustifikasi dalam keengganan untuk membayar pempetisyen.

Selanjutnya, pemfailan petisyen adalah pramasa kerana kontrak tersebut menghendaki pempetisyen membaiki kecacatan dalam tempoh liabiliti kecacatan 12 bulan. Akibat kemungkiran pempetisyen, di bawah kontrak tersebut penentang berhak menolak daripada sijil interim untuk kerja pembaikan. Atas isu ini juga, terdapat pertikaian bona fide atas tuntutan oleh pempetisyen (lihat ms 614E–G dan 615C–D).

(2) Tidak dapat dipastikan daripada keterangan dan hujah yang ada sama ada jumlah yang ditahan adalah mencukupi bagi meliputi kesemua kerja pembetulan, kerana sebahagian besar kerja pembetulan masih belum dijalankan. Walau bagaimanapun, surat arkitek dengan sendirinya mengatasi pelepasan sebahagian jumlah yang ditahan di bawah Sijil Interim No 16. Jika pun arkitek berpandangan bahawa baki sebahagian lagi adalah mencukupi bagi merangkumi kerja-kerja yang cacat, dia sepatutnya menulis '... ditolak daripada baki sebahagian jumlah yang ditahan'. Dalam keadaan sedemikian, tuntutan pempetisyen yang termasuk setengah daripada jumlah yang ditahan adalah melampau, dengan itu menyebabkan notis s 218 tidak sah (lihat ms 615F dan 616E–G).]

Notes

For cases on building contract, see 3 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 1245–1337.

For cases on winding up, see 3 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 399–570.

Cases referred to

Datuk Mohd Sari bin Datuk Hj Nuar v Idris Hydraulic (M) Bhd [1997] 5 MLJ 377 (refd)

Gilbert-Ash (Northern) Ltd v Modern Engineering (Bristol) Ltd [1973] All ER 195 (refd)

Pembenaan Leow Tuck Chui & Sons Sdn Bhd v Dr Leela's Medical Centre Sdn Bhd [1995] 2 MLJ 57 (refd)

Legislation referred to

Companies Act 1965 ss 218, 218(1)(e), (1)(i), (2)

TJ Su (*KL Pang* with him) (*Cheah Teh & Su*) for the petitioner.

LY Oon (*Apparo Apana* with her) (*KC Yap Kamaludin & Partners*) for the respondent.

Cur Adv Vult

Kamalanathan Ratnam JC:

Facts

By a letter of offer dated 7 December 1993, the respondent awarded a contract known as 'Cadangan Mendirikan Sebuah Kompleks Membeli-Belah Berserta dengan Tempat Letak Kereta Bawah Tanah di Tanah Kerajaan di Persimpangan Jalan Seremban Kuala Pilah' ('the project') to one Orient Marvel Sdn Bhd ('the original contractor'). On or about 23 May 1994, the respondent and the original contractor signed a building contract ('the contract') with a schedule of conditions sanctioned by the Pertubuhan Arkitek Malaysia ('PAM'). On or about 2 September 1994, the respondent, the petitioner and the original contractor entered into a deed of novation whereby the respondent agreed to release and discharge the original contractor from further performance of the terms and conditions of the contract. In consideration thereof, the respondent agreed to be bound by the terms and conditions of the contract as if the respondent had entered into the contract with the petitioner.

On 6 October 1995, Arkitek Azamrakan, the architect to the project ('the architect') certified Interim Certificate No 15 for a sum of RM1,106,099.57. On 9 October 1995, the architect issued a certificate of practical completion ('the CPC'). A copy of the CPC was annexed as exh LTV-3 to encl 16. On 16 November 1995, the architect issued Interim Certificate No 16 for a sum of RM1,646,782.94.

Due to the failure of the petitioner to remedy the defects and complete the works, the respondent refused to pay the petitioner. The petitioner then sent the statutory notice of demand dated 10 July 1996 pursuant to s 218 of the Companies Act 1965 ('the Act') demanding the total sum of RM2,752,882.51 based on Interim Certificate Nos 15 and 16. The respondent by its solicitors' letter dated 26 July 1996 replied to the statutory demand disputing the debt on the basis that the building constructed had been found to have various defects, including roof leakages

and defective air-conditioning system as well as many others. The respondent contended it was engaging consultants to come up with the estimated cost of rectification and repairs to damage caused by the petitioner. It contended that some tenants had even stopped paying rentals due to the defects and that the respondent's reputation had been seriously damaged. It threatened a counterclaim.

"ere there defects?

There is no doubt that the building constructed by the petitioner had various defects. In fact, the architect had issued instructions to the petitioner to rectify the defects. The CPC issued by the architect reads as follows:

> In accordance with our Standard Form of Contract, I/we certify that subject to the making good of any outstanding items, or of any defects, shrinkages and other faults which appear during the defects liability period (a list of which is enclosed for immediate action):
>
> (a) the works were completed to our satisfaction and taken into possession on 9 October 1995,
>
> and that the said defects liability period will end on 9 October 1996.

In fact, the list enclosed was a formidable list and is too numerous and detailed for reproduction. The defects covered the basement, the ground floor, the first floor, second floor and external works. This list was prepared by the architect as a result of a second inspection conducted on 4 October 1995. The respondent had exhibited photographs showing the defects in its affidavit.

No action was taken by the petitioner to comply with the architect's instruction to remedy the defects. In fact, numerous letters were sent by the architect in respect of the defects. These letters were exhibited collectively as exh I (pp 10–15) of encl 17. Tenaga Nasional Bhd ('TNB') had also informed the respondent that the wiring to the building was not in accordance with the approved plans. The respondent was instructed by TNB through its letter dated 16 May 1996 (exh N to encl 18). The architect's letter dated 11 April 1996 (exh I p 15 to encl 17) gave an ultimatum. It reads, inter alia:

> Please be informed that you are required to remedy all the defective work as per the list [attached] from the client. If you do not take action within seven days from this letter issued, we shall engage other contractors to carry out the work and the cost incurred shall be deducted from the retention sum.

The original contractual completion date was 13 June 1995. The architect granted extension on 11 April 1996. The defects liability period expired on 9 October 1996 and a final certificate has not been issued till today. The petitioner filed this winding-up petition on 19 August 1996.

Is the petitioner a creditor within the meaning of s 218(1)(e) of the Act?

Although the petition as well as the statutory notice of demand pursuant to s 218 did not specify the particular provision of the Act under which the

petitioner is proceeding, it is clear from the petition itself that the petitioner is relying on two grounds:

(a) that the respondent is unable to pay its debts (s 218(1)(e) of the Act); and

(b) it is just and equitable that the respondent be wound up (s 218(1)(i) of the Act).

Is there a bona fide dispute as to the debt?

I shall consider this under various heads.

(a) Defective works not rectified

Case law has established without a doubt that if there is a bona fide dispute as to the petitioner's claim, the petitioner cannot be deemed to be a creditor within s 218(2) of the Act. Although Interim Certificate No 15 was issued on 6 October 1995, the respondent had a period of 30 days to honour the certificate and that was up till 6 November 1995. When the CPC was issued subject to a list of defects to be rectified by the petitioner on 9 October 1995, the petitioner had seven days as stated in cl 2(1) of the contract — that is, up till 16 October 1995 — to comply with the architect's instructions. However, in breach of its obligations under the contract, the petitioner failed to initiate any action or give any indication of its willingness to rectify the defects. It is pertinent that I reproduce cl 2(1) of the contract, which reads:

> The contractor shall (subject to sub-cll (2) and (3) of this condition) forthwith comply with all instructions issued to him by the architect in regard to any matter in respect of which the architect is expressly empowered by these conditions to issue instructions. If within seven days after receipt of a written notice from the architect requiring compliance with an instruction the contractor does not comply therewith, then the employer may employ and pay other persons to execute any work whatsoever which may be necessary to give effect to such instruction and all costs incurred in connection with such employment shall be recoverable from the contractor by the employer as a debt or may be deducted by him from any money due or to become due to the contractor under this contract.

From this clause, it appears to me that the respondent may recover from the petitioner or may deduct any money due or to become due to the contractor provided:

(a) the architect has issued a written notice to the petitioner to rectify the defects; and

(b) that at the expiry of seven days, it has been shown that the petitioner has failed to do so.

In the case before me, even prior to the expiry of the period for honouring Interim Certificate No 15 — that is by 6 November 1995 — the petitioner was already in breach of its obligation to comply with the architect's instruction issued together with the CPC as the seven days from the date

of the CPC — that is 9 October 1995 — had expired on 16 October 1995 and the petitioner had still failed to rectify the defects. A

I find that the respondent was thus justified in refusing to pay the petitioner when the architect issued Interim Certificate No 16.

Further, I find that cl 15(3) lends assistance to the respondent's cause. The said clause is reproduced: B

> Clause 15:
>
> (3) Notwithstanding sub-cl (2) of this condition the architect may whenever he considers it necessary so to do, issue instructions requiring any defect, shrinkage or other fault which shall appear within the defects liability period named in the appendix to these conditions and which is due to materials or workmanship not in accordance with this contract to be made good, and the contractor shall within a reasonable time after receipt of such instructions comply with the same and (unless the architect shall otherwise instruct, in which case the contract sum shall be adjusted accordingly) entirely at his own cost. Provided that no such instructions shall be issued after delivery of a schedule of defects or after 14 days from the expiration of the said defects liability period. C D

It is my finding that the petitioner had an obligation to comply with the architect's instructions and to rectify the defects at its own cost pursuant to the architect's instructions. It is not open to the petitioner to argue that since it has not been paid it is entitled to disregard the architect's instructions and refuse to rectify the defects. It is clear that the respondent had a grace period of 30 days from the issuance of Interim Certificate No 15, that is from 6 October 1995, to pay the petitioner. It was the petitioner's breach in the first instance that prompted the respondent to exercise its rights under cl 2(1) of the contract to withhold payment. E F

It is obvious that the CPC meant that for all practical purposes the works had been completed on 9 October 1995 subject to the petitioner rectifying the defects enumerated in the long list. For the purposes of a right to wind up, I find that the failure of the petitioner to comply with the architect's directive with regard to the defects clearly and without a doubt gave the respondent a right to dispute the interim certificate and it follows therefore that the debt is in dispute. G

Exhibit J to encl 17 shows numerous quotations and invoices collectively so marked from other contractors reflecting the possible expenses that would be incurred in rectifying the defects. Till to date, the rectification works have yet to be completed. In encl 17, the respondent has averred that the major rectification works could only be carried out after the expiry of the defects liability period as during this period it was the duty of the petitioner to have carried out the rectification works which it even then did not do. H

I

(b) Maintenance during the defects liability period

The petitioner was also under an obligation to maintain the building for the first 12 months from the date of issuance of the CPC; however, the

petitioner had failed to do so. As a result, the respondent had to engage independent contractors to do the same and the respondent had exhibited copies of letters marked as exh M to encl 17 appointing independent contractors.

(c) Is the respondent entitled to deduct from Interim Certificate Nos 15 and 16?

Since the defects liability had only expired on 9 October 1996 (see CPC, exh LTV-3 to encl 16) coupled with the petitioner's blatant disregard for repeated requests to rectify the defects, I find that the filing of this petition on 19 August 1996 is premature bearing in mind that cl 15(3) requires the petitioner to rectify the defects within the 12-month defects liability period. I hold that the petitioner was in fact under a contractual obligation to remedy any defects liability which may appear until the last day of the defects liability period. As a result of the breach on the part of the petitioner, it is my judgment that the respondent is entitled under cl 2(1) of the contract to deduct from the interim certificates for the rectification works. In fact, the said clause expressly allows the respondent to do so. On this issue too, I find that there is a bona fide dispute on the demand by the petitioner.

(d) Retention sum

In its submission, the petitioner contended that the balance one moiety of the retention sum was sufficient to cover all the rectification costs and that therefore the respondent ought to honour the two interim certificates. I am unable to ascertain from the available evidence and submission whether the retention sum is sufficient to cover all the rectification works, as the major rectification works have yet to be carried out.

Be that as it may, I note that the architect's Interim Certificate No 16 had included a release of one moiety of the retention sum. The release of one moiety of the retention sum does not by itself mean that the petitioner could speculate that the architect was of the opinion that the balance half of the retention sum was sufficient to remedy the defective works. The architect had merely certified the release in accordance with cl 30(4) of the contract.

Clause 30(4) provides as follows:

> The amounts retained by virtue of sub-cl (3) of this condition shall be subject to the following rules:
>
> (a) The employer's interest in any amounts so retained shall be fiduciary as trustee for the contractor (but without obligation to invest) and the contractor's beneficial interest therein shall be subject only to the right of the employer to have recourse thereto from time to time for payment of any amount which he is entitled under the provisions of this contract to deduct from any sum due or to become due to the contractor.
>
> (b) On the issue of the certificate of practical completion, the architect shall issue a certificate for one moiety of the total amounts then so retained and the contractor shall, on presenting any such certificate to

the employer, be entitled to payment of the said moiety within the period for honouring certificates named in the appendix to these conditions. A

(c) On the expiration of the defects liability period named in the appendix to these conditions, or on the issue of the certificate of completion of making good defects, whichever is the later, the architect shall issue a certificate for the residue of the amounts so retained and the contractor shall, on presenting any such certificate to the employer, be entitled to payment of the said residue within the period for honouring certificate named in the appendix to these conditions. B

I find that cl 30(4)(a) has the effect of allowing the respondent to deduct any sum due or become due to the petitioner provided the respondent is entitled to do so under the conditions of the contract. No doubt the sum certified under Interim Certificate No 15 was due within the 30-day period for payment but as found by me earlier, the respondent is entitled to deduct from the said sum for rectification works. C

Clause 30(4)(b) and (c) envisage a situation where the petitioner complies with the architect's instructions and rectifies the defects *at its own costs* (emphasis added). If the petitioner is in breach of the terms and conditions of the contract, it would result in a ridiculous situation if the respondent was forced to pay the amounts allegedly due, then also incur costs for rectification of the defects which ought to have been borne by the petitioner at its own costs. D E

In any event, the architect has stated by his letter dated 11 April 1996 that the costs of rectification would be deducted from the retention sum (exh I p 15 to encl 17). This letter by itself serves to override the release of one moiety of the retention sum under Interim Certificate No 16. If indeed the architect was of the opinion that the balance one moiety is sufficient to cover the defective works, I would have expected him to have written '... deducted from the balance one moiety of the retention sum'. F

In the circumstances, it is my judgment that the demand of the petitioner which included one half of the retention sum amounting to RM1,293,733.19 is excessive, thus rendering the s 218 notice invalid. G

(e) Whether the architect's certificates are final and conclusive

To decide on this issue, it is pertinent to refer to cl 30(6) which reads: H

> Save as aforesaid no certificate of the architect shall of itself be conclusive evidence that any works materials or goods to which it relates are in accordance with this contract.

It is an irresistible conclusion to be drawn from this clause that whilst the petitioner may have completed the building and the architect had certified payments for the works, yet the certificates by themselves cannot be deemed to be conclusive proof that the works of the petitioner were satisfactorily completed. I

(f) Damages

It is always open to the respondent to include a claim for damages arising out of the breach, in addition to a claim for costs of rectification. There is also the issue of a claim for damages for the delay in the completion of the project. Pursuant to cl 22 of the contract, the respondent was entitled to a claim of RM3,000 per day for the delay in completion. Further, in para 16 to encl 14, the respondent has stated various other claims it intends to make against the petitioner amounting to RM5.2m. Whether the respondent succeeds on these claims or not is not in issue here. What I have to be satisfied is, whether there is a sufficient dispute as to the debt claimed by the petitioner.

(g) What is the effect of an interim certificate

Keating on Building Contracts (5th Ed, 1991) at p 76 says:

> 1 Progress or interim certificates
>
> These certificates are issued from time to time during the course of the work certifying that, in the opinion of the architect, work has been carried out, and, in some cases, materials supplied, to the value £X. They are approximate estimates, made in some instances for the purpose of determining whether the employer is safe in making a payment in advance of the contract sum, in others whether he is under a duty to pay an instalment and if so, how much he is to pay. Such certificates are not normally binding upon the parties as to quality or amount and are subject to adjustment on completion.

As to a final certificate, he says this at p 77:

> 2 Final certificates
>
> A final certificate may certify the amount finally payable to the contractor under the contract, or the satisfaction of the architect that work conforms with the contract, or both. Upon these matters the architect's decision embodied in his certificate is often binding and conclusive on the parties. This is discussed below.

In respect of defective works, he has this to say at p 202:

> Where there has been substantial completion the measure of damages is the amount which the work is worth less by reason of the defects and omissions, and is normally calculated by the cost of making them good, ie the costs of reinstatement.

It is my finding therefore that the respondent does in fact have a bona fide claim against the petitioner. Such issues can only be resolved either in arbitration proceedings or in a civil suit where witnesses could be called to give evidence. In my view, the winding up petition is not the right step in the present case.

(h) Is the respondent insolvent, that is, unable to pay its debts?

The petitioner founded its petition solely on the presumption under s 218(2) of the Act in that the respondent had failed to comply with the said notice

by neglecting to pay the sum demanded. It is trite law that this presumption is rebuttable. In this case, there is no question of the respondent 'neglecting' to pay its debt. The respondents had given sufficient notice to the petitioner disputing the said debt as soon as it received the statutory notice.

In any case, no evidence whatsoever was put before the court to show that the respondent was unable to pay its debts. The petitioner had also failed to adduce any evidence to show that the present contingent and prospective liabilities of the respondent exceed its assets. It simply refused to pay the petitioner because the petitioner had breached its conditions and failed to comply with the architect's directives to rectify. Further the respondent had a counterclaim which exceeds the petitioner's claim. In any case, the claim for set-off by the respondent is clearly not based on any common law right of set-off as argued by the petitioner. The right to set-off is based on cll 2(1), 22 (relating to a claim for damages for non-completion) and 30(8) of the contract. There is evidence that the respondent had already paid the petitioner RM42,518,489.04 for the project. This does not reflect the position of an insolvent respondent. I am therefore satisfied that the respondent had succeeded in rebutting the presumption under s 218(1)(e) of the Act.

(i) Is it just and equitable to wind up the respondent?

As I see it, the petitioner is not relying on any other ground, other than the presumption of the respondent's inability to pay on the demand notice. This court in any case would not exercise its discretion in favour of the petitioner and wind up the respondent under the 'just and equitable' provision unless it can be reasonably ascertained that the existing and probable assets of the respondent will be insufficient to meet the existing liabilities. In fact, in *Datuk Mohd Sari bin Datuk Hj Nuar v Idris Hydraulic (M) Bhd* [1997] 5 MLJ 377, I applied the 'overall assets and liabilities test' to ascertain whether a company is insolvent. Of course, the burden is always on the petitioner to satisfy me on the above requirement. No evidence has been produced to this effect in this case.

The petitioner relied heavily on *Pembenaan Leow Tuck Chui & Sons Sdn Bhd v Dr Leela's Medical Centre Sdn Bhd* [1995] 2 MLJ 57, where summary judgment was obtained in favour of the main contractor for the amount certified in the penultimate progress payment certificate which the court held to be an interim certificate. In the present case, it was argued that the respondent had not referred the matter as yet to arbitration which it ought to have done as soon as the CPC was issued.

Having studied *Pembenaan*'s case, I find that the petitioner has totally missed the point. Edgar Joseph Jr FCJ said very lucidly at p 71 of that case:

> Pausing at this point, it is noteworthy that the architect had not invoked his powers under cl 15 to direct the builder to execute rectification works, arising from the complaints of the employer of defective works, materials and/or over-valuation. As already pointed out, the builder was under no contractual obligation to comply with these complaints of the employer

A unless supported by written instructions issued by the architect pursuant to cl 2(1).

In fact, his Lordship continued (at the same page):

> To complete the picture of the factual matrix in this case, the following matters should be noted:
>
> B (1) There was contemporary correspondence passing between the parties and the architect which indicated that:
>
> (a) the employer had repeatedly prevented the builder from carrying out repairs to defective works as certified by the architect;
>
> (b) after the certified defects had been finally completed, the employer had prevented the exercise of a joint inspection by all concerned; and
>
> C (c) the employer had, at a very late stage, terminated the services of the architect and had refused to appoint a replacement, thus preventing the issuance of the final certificate.

Nothing of this sort had occurred in the case before me. The architect had clearly and unequivocally issued a list of defects which he had certified and D which he required the petitioner to rectify. None of the other situations giving rise to the factual matrix as arose in *Pembenaan*, arose before me. In rightly rejecting Lord Denning's view in *Gilbert-Ash (Northern) Ltd v Modern Engineering (Bristol) Ltd* [1973] All ER 195 that an architect's or engineer's certificate is to be treated virtually as cash like a bill of exchange, E Edgar Joseph Jr FCJ in referring to the interim architect's certificate said at p 75:

> ... it conferred 'temporary finality' on the certificate and a right to immediate payment in full *in the absence of an express contractual provision permitting deduction of the matter in question.* (Emphasis added.)

F In the case before me, the architect's letter itself clearly empowers the respondent to seek deductions. The petitioner's reliance on *Pembenaan*'s case was flawed from the outset.

I do not think it is my duty at this stage to decide whether the parties ought to go for arbitration or not. Suffice it for me at this stage to hold that G the respondent has raised sufficient issues to warrant a dismissal of the petition. It is my view that if the respondent intends to proceed to arbitration it ought to make the necessary application for a stay pending arbitration and to the proper forum, and not raise it by way of an affidavit before me in this petition. Having thus considered the submissions of both parties and having read all the cases referred to in the submissions, I dismissed the H petition with costs.

Petition dismissed.

Reported by Loo Lai Mee

I